Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-433

Marcus A. Arnheiter,

Petitioner,

vs.

Random House, Inc. and
Neil Sheehan,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit Before Judgment and Motion For Leave To File Petition

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Motion For Leave To File Petition For Writ Of Certiorari

Now comes the petitioner and respectfully moves this Court for leave to file the annexed petition and pending petition No. 79-281 incorporated herein by reference and made a part hereof for writs of certiorari under Section 1651 of Title 28,United States Code,directed to the United States Court of Appeals for the Ninth Circuit wherein an appeal is presently pending from a judgment denying petitioner's motion to vacate summary judgment based upon recent decisions of this Court,which judgment was entered on August 17, 1979 in the District Court of the United States for the Northern District of California and for such further relief as may be just and proper.

Dated: September 4, 1979

Leon S. Wolk

Counsel for Petitioner

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit Before Judgment,And Motion For Leave To File Petition

Marcus A. Arnheiter,respectfully prays that a writ of certiorari be issued to the United States Court of Appeals for the Ninth Circuit,before judgment in issue in that Court,based upon a final judgment by the Honorable Spencer Williams,Judge of the United States District Court for the Northern District of California denying petitioner's motion to vacate judgment and imposing sanctions of $300.00 against petitioner and his attorney Leon S. Wolk, dated August 17, 1979.Notice of Appeal was thereafter filed with the Clerk of the United States Court of Appeals for the Ninth Circuit on or about August 27, 1979.Petitioner had sought to vacate a summary judgment in a constitutional

.....

defamation case entered on November 5, 1975,prior to the completion of and with motion pending to complete the discovery on issues of state of mind of author and publisher.This discovery motion was also denied at that time. This summary judgment was affirmed by the Ninth Circuit in Arnheiter v.Random House, Inc and Neil Sheehan, (July 17, 1978) 578 F.2d 804. Said motion to vacate was served and filed on or about July 14, 1979 and based upon recent decisions of this Court and F.R.C.P., Rule 60(b),(5),and (6).These cases were Herbert v. Lando, 99S. Ct. 1635, Wolston v. Readers Digest Association,Inc., 99 S. Ct. 2701 and Hutchinson v. Proxmire, 99 S.Ct. 2675 all decided in 1979 shortly before the summer recess. These cases were argued before the Second Circuit which, contrary thereto, affirmed based upon res judicata and collateral estoppel arising

from aforesaid summary judgment and denial of further discovery entered by Judge Spencer Williams and thereafter affirmed by the Ninth Circuit.

The decision of the Second Circuit, entered on May 18, 1979,affirming summary judgment and denial of further discovery by the Honorable John M. Cannella, Judge of the United States District Court for the Southern District of New York is the subject of a presently pending petition for a writ of certiorari in the Supreme Court of the United States No.79-281 which petition is incorporated herein by reference and made a part hereof.Petitoner respectfully requests that the within petition be consolidated with the aforesaid pending petitions since they all involve identical or closely related questions.

The within petition is based upon the applicable common law and statutory jurisidiction of this Court.

Opinion Below

The judgment denying motion to vacate and imposing sanctions upon petitioner and his attorney is dated August 17,1979,is set forth in Appendix A infra.The related opinion dated October 31, 1975, is unreported and is set forth in Appendix B,infra. The Ninth Circuit affirmance is reported at 578 F. 2d 804 and is set forth in Appendix C,infra.

Jurisdiction

The judgment in the District Court was entered on August 17, 1979 and timely Notice of Appeal was filed with the Clerk of the Ninth Circuit on or about August 27, 1979.Said appeal is presently pending and no judgment has been entered thereon by the Ninth Circuit. The jurisidiction of the Supreme Court of the United States is invoked under 28 U.S.C. sect. 1254(1) and Rule 20 of the Rules of this Court, and if needed, within petition to be

considered a motion for leave to file a common law writ of certiorari under 28 U.S.C. sect. 1651(a) and Rules 30 and 31 of the Rules of this Court.

Question Presented

Where lower courts refuse to harmonize the First and Seventh Amendment,United States Constitution, by routinely,as a rule and not as an exception,granting summary judgment in constitutional defamation cases and otherwise unduly restricting discovery by denying motions to compel responsive answers relating to issues of state of mind, knowledge and motive,relevant to the actual malice of author and publisher,thereby deny plenary jury trials,contrary to recent decisions of this Court,which lower courts refuse to enforce retroactively, to pending appeal and pursuant to F.R.Civ. P. Rule 60(b) (5) and (6) and in abuse of discretion refuse

to vacate judgment and impose sanctions upon petitioner and his counsel, for attempting to obtain lower court compliance with said decisions of this Court, should not petition for a writ of certiorari be granted?

Constitutional Provisions and Statutes Involved

Citations in pending petition to the United States Supreme Court, No. 79-281 is respectfully incorporated herein. In addition thereto are the following;

1. 28 U.S.C.1254(1).

2. 28 U.S.C. 1651(a)

3. Fed. Rules Civ. Proc. Rule 60(b) (5) and (6), 28 U.S.C.

Statement of the Case

The statement of the case, except as herein set forth, has been contained in pending petition to the United States Supreme Court, No. 79-281 and is respectfully incorporated herein. Petitioner had moved to compel discovery which was denied by Judge Spencer Williams when he granted summary judgment. (R.-353 to R.-369, including document numbers 89, 90, 91, 92, and 93, R.-419 to R.427, which references are to the record on appeal filed with the Ninth Circuit April 5, 1976 relating to No. C-72-342 SW, 76-1753.

Reasons for Granting the Writ

1.-Review of this case before judgment in the Court of Appeals is required to permit expeditious and comprehensive review of lower court practice of routinely,as a rule and not as an exception, granting summary judgment in constitutional defamation cases and denying motions to compel discovery relating to issues of state of mind, knowledge,relevant to the actual malice of author and publisher, thereby deny plenary jury trial under the Seventh Amendment,subordinating it to the First Amendment,Urited States Constitution,which is a matter of such public importance as to require immediate settlement in this Court.

2.-Recent decisions of this Court in the cases of Herbert v. Lando, Wolston v. Readers Digest Association Inc.and Hutchinson v. Proxmire supra, relating to the law of constitutional defamation,are retroactive in effect, to pending appeal (petition no.79-281 pending) and provides the basis for vacation of judgment,contrary to said decisions of this Court,relied upon as res judicate and collateral estoppel and the denial of petitioner's motion pursuant to F.R.Civ. P. Rule 60(b) (5) and (6) and the imposition of monetary sanctions against petitioner and his counsel is such a gross abuse of discretion as to justify immediate clarification and settlement by this Court of an issue of imperative public importance.

Fed. Rules Civ. Proc. Rule 60(b) (5) and (6) ,28 U.S.C. provide for the relief from a judgment under certain circumstances. A change in constitutional law or a clarification of constitutional law by a decision of the Supreme Court of the United States in the tort law of constitutional defamation is retroactive.This Court granting the within petition for a writ of certiorari and the related petition pending as No. 79-281 and incorporated herein by reference will thereby harmonize the First Amendment and Seventh Amendment,United Stares Constitution,by settling the issues as to whether summary judgment should be the rule rather then the exception in constitutional defmation cases and the role of the trial court in discovery. These issues unresolved give rise to numerous appeals,prior and subsequent to plenary jury trial resulting in an increase in court congestion and financial attrition

of the defamed victim,confronted as in the instant petitions,by the vast financial resources of a mass media communications conglomerate. Judge Spencer Williams use of monetary sanctions against petitioner and his counsel for attempting to obtain compliance with the decisions of this Court pursuant to the aforesaid rule of civil proceedure, justifies the supervisory intervention of this Court.The denial of petitioner's motion to vacate summary judgment coupled with imposition of monetary sanctions is a gross abuse of discretion, itself creating a real chilling effect upon petitioner's constitutional right to due process. A decision of reversal of said judgment by this Court will prevent the use, or threat,of monetary sanctions from being used by the lower courts and media counsel from further frustrating defamed victim in his quest for a plenary jury trial under the Seventh Amendment.

United States Constitution.

All of the reasons for granting the petition for a writ of certiorari in pending petitions No. 79-281 are respectfully incorperated herein and made a part hereof. The Second Circuit,affirmed based upon res judicata and collateral estoppel in petition No. 79-281 based upon a decision of the Ninth Circuit affirming Judge Spencer Williams summary judgment and denial of further discovery, all of which are contrary to recent decisions of this Court. Granting the petitions for a writ of certiorari and thereafter clarifying the law in constitutional defamation cases so as to harmonize the First and Seventh Amendments, United States Constitution, are issues of imperative public importance and justify the herein requested deviation from the normal appellate process. Where a decision is contrary to decisions of this

Court, can and should it be the basis of a decision predicated upon res judicata and collateral estoppel where a direct attack upon the erroneous judgment is made by motion to vacate within one year from entry of Ninth Circuit affirmance ? This Court should decide,consistent with giving retroactive effect to its decisions, that the answer is in the negative.

This issue at present is still open and should be clarified by this Court. Compare;Polites v.United States, 364 U.S. 426 ,Klapprott v. United States, 335 U.S. 601,Ackermann v. United States, 240 U.S. 193. A change or clarification in the tort law of constitutional defamation is an a fortiori case, and the decision of this Court should clearly indicate it is retroactive in effect. Great Northern Ry. Co. v.Sunburst Oil & Refining Co., 287 U.S. 358.

Linkletter v. Walker, 381 U.S. 618,
Bradley v. School Board of Richmond,
416 U.S. 696 . See also Marbury v. Madison,
5 U.S.(1 Cranch) 137,

This Court has never held that in constitutional defamation cases, summary judgment is the rule rather then the exception and yet that is what the lower courts have held in the instant petitions. Herbert v. Lando supra, Wolston v. Readers Digest Association, Inc. supra and Hutchinson v. Proxmire,supra all decided in 1979 should have been retroactively applied by the Second Circuit.Petitioner so argued but instead the Second Circuit,ignored these decisions of this Court and decided instead to circumvent them by the use of the doctrines of res judicata and collateral estoppel. Thereafter Judge Spencer Williams denied petitioner's motion to vacate that very summary judgment relied upon by the Second Circuit, and also imposed monetary sanctions.

Unless all of these petitions are granted, the lower courts will have denied retroactive effect to the decisions of this Court and in effect, for this petitioner,perpetuate an injustice based upon bad law without any justification. Seven years of litigation have to date resulted in a denial of meaningful discovery on the issues of actual malice and the entry of summary judgments have denied to him his constitutional right to a plenary jury trial. The record below supports a plenary jury trial at this time,however assuming per arguendo that it does not, discovery should be completed with judicial supervision.The record below reveals discovery frustrated by judicial tolerance,of respondents evasive tactics.The imposition of a monetary sanctions by Judge Spencer Williams, refusing to give retroactive effect to the decisions of this Court, unless reversed,will reward respondents.

To deny these pending petitions, subjects, petitioners to the hardship of being subject to bad law.By giving retroactive effect to the recent decisions of this Court petitioner Arnheiter would be the recipient of its benefits. There is no hardship based upon reliance, to which respondents can claim, as justification for preventing retroactivity. This is particularly applicable in the field of torts, as distinguished from the law of property, contracts and taxation.

> "In tort cases,however,it is my opinion that the hardship on parties who would be saddled with an unjust precedent if the overruling were hot made retroactive,ordinarily outweighs any hardship on those who acted under the old rule or any benefits that might be derived from limiting the new rule to prospective operation. Neither the tortfeasor nor the victim takes account of expanding or contracting rules of tort liability except tangentially in the course of routinely insuring against such liability...."Traynor, Roger J.,

Quo Vadis,Prospective Overruling:A Question of Judicial Responsibility, 28 The Hastings Law Review 533,pp.545-546 (1977)

New York Times v. Sullivan, 376 U.S. 254, was itself , a decision by this Court, which was a departure from the prior law of defamation.This Court has never decided that the First Amendment repealed the Seventh Amendment of the United States Constitution. Nor has this Court ever decided that in constitutional defamation cases summary judgment is the rule rather then the exception. A review of the decisions of the lower courts in the instant petitions reveals, that expressly and impliedly, this is what has been decided by both the Second and Ninth Circuits. This Court has expressed concern for the routine denial of defamed victims constitutional right to a plenary jury trial and it is now time to clearly so decide the law. Compare Hutchinson v. Proxmire, footnote 9 on page 8 of slip opinion

> "Considering the nuances of the issues raised here, we are constrained to express some doubt about the so-called 'rule'.The proof of 'actual malice' calls a defendant's state of mind into question,New York Times v. Sullivan, 376 U.S. 254 (1964) and does not readily lend itself to summary disposition....".

Conclusion

By reason of all of the aforesaid the within petition for a writ of certiorari should be granted,incorporating by reference pending petition No.79-281.

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United States District Court for the
Northern District of California
Arnheiter v. Random House, Inc.et. als
No. C- 72-342 SW
Order Denying Plaintiff's Motion
To Vacate Judgment And Imposing
Sanctions

The motion of plaintiff to vacate the judgment in this action having been duly considered, the Court having reviewed the papers filed by the parties and being fuly advised in the premises,

It is hereby ORDERED that plaintiff's motion be and the same is hereby denied; and

The Court having found that said motion frivolous, groundless and vexatious, it is hereby ORDERED that sanctions be and the same are hereby imposed against plaintiff and Leon S. Wolk,Esq.his attorney,and in favor of defendants, in the sum of $ 300.00.

Dated August 17,1979

/s/ Spencer Williams
Judge of the United States
District Court

In The United States District Court
Northern District of California
Before Honorable Spencer Williams,Judge
Marcus A. Arnheiter v. Random House,Inc
and Neil Sheehan, No. C 72-342 SW,
decided October 31, 1975 ...

THE COURT: Taking everything you say most favorably to the plaintiff,I still don't think that there would be an issue to go to the jury on the question of actual malice.Therefore I'll grant the motion for summry judgment...."

... Order

The motion of defendants RANDOM HOUSE,INC.,and NEIL SHEEHAN for summary judgment and plaintiff's motions to transfer the above-entitled actions to the United States District Court for the Southern District of New York, to compel further discovery and to amend the last remaining count of his first amended complaint by

striking from paragraph 3 thereof all but items 1, 6,7,8,25,26,28,43 and 44, having come on to be heard on the 31st day of October 1975, ...

It further appearing to the Court that the writing and publication by defendants Neil Sheehan and Random House,Inc.,respectively, of the book entitled The Arnheiter Affair are subject to the protection of the First and Fourteenth Amendments to the Constitution of the United States (New York Times Co. v. Sullivan(1964) 376 U.S. 254); that plaintiff has not met and could not,with further discovery, meet the burden placed upon him thereunder of coming foward with any fact which proves that said book or any portion thereof claimed by plaintiff to be false and defamatory was written and published

by defendants or either of them with knowledge of the falsity or reckless disregard for the truth thereof; that there is, therefore, no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law; and good cause appearing therefor:

It is ORDERED:

1. That the motion of defendants Random House, Inc. and Neil Sheehan for summary judgment be and the same is hereby granted and that judgment in the in the above-entitled action be entered accordingly;

2. That all but items 1,25,26,28, 43 and 44 of paragraph 3 of the last remaining count of plaintiff's first amended complaint be and the same is hereby stricken;

3. That plaintiff's motion to compel further discovery be and the same is hereby denied; and

4. That,by reason of the granting of defendants' motion for summary judgment plaintiff's motion to transfer the above-entitled action to the United States District Court for the Southern District of New York has become moot.

Dated: 11-5-75

/s/ Spencer Williams

Judge of the

United States District Court

Arnheiter v. Random House,Inc. and Neil Sheehan No. 76-1753,578 F.2d 804 (9th.Cir. 1978) Before Browning and Anderson, Circuit Judges and D. Williams, District Judge

PER CURIAM:

Neil Sheehan wrote a book,published by Random House. Inc., reporting events which occurred during appellant's 99-day command of a Navy war ship, the Vance, on patrol duty during the Vietnam war. Captain Arnheiter was removed from his command by superior officers when they concluded from irregularities in his conduct that he was not fit for command. Arnheiter's persistent efforts to bring about a reversal of this decision became the subject of much public notice and attention from journalists. The Navy upheld the removal, and no Court of Inquiry was convened,despite appellant's urging.

Sheehan's book concluded that the removal was proper.

(1) The trial court granted summary judgment in favor of the author and publisher on the ground that the allegedly libelous material was protected under the rule of New York Times v. Sullivan,376 U.S. 254,84 S.Ct.710,11 L.Ed 2d 686(1964).In appeal Arnheiter argues: (1) that he is not a public official or public figure within the meaning of New York Times,(2) that summary judgment was improper because there was a genuine jury issue,i.e. whether the material was published with knowledge of its falsity,or with reckless disregard of the truth,and (3) that further discovery should have been permitted.

In Rosenblatt v.Baer, 383 U.S. 75,85, 86 S.Ct. 669,675, 15 L.Ed2d 597 (1966) it is said:

> "Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized. It is clear, therefore, that the 'public official' designation applies at the very least to those among the hierarchy of government employees who gave, or appear to the public to have substantial responsibility for or control over the conduct of government affairs".

The commanding officer of a United States Navy vessel during war is in control of governmental activity of the most sensitive nature. Such a person holds a position that invites "public scrutiny and discussion" (Rosenblatt, ibid. n.13) and fits the description of a public official under New York Times. See Henry v. Collins, 380 U.S. 356, 85 S. Ct. 992, 13 L.Ed2d 892 (1965); Garrison v. Louisiana, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed2d 125 (1964)

After New York Times, the Supreme

Court extended the constitutional privilege to defamatory criticism of "public figures". See Curtis Publishing Co. v. Butz, and Associated Press v. Walker, 388 U.S. 130, 162, 87 S.Ct. 1975, 18 L.Ed2d 1094 (1967). Appellant claims he is not a public figure within the meaning of these cases because he did not thrust himself into controversy,[1] but only sought redress for what he contends was wrongful removal. He cites Time, Inc. v. Firestone, 424 U.S. 448, 96 S. Ct. 958, 47 L.Ed2d 154 (1976) in which a divorcee prevailed in a libel action against a magazine which had inaccurately reported that the divorce was granted on grounds of adultery and extreme cruelty. It was held that she fell outside the definition of a public figure for two reasons: first, her divorce was not a "public controversy," despite considerable attention in the local press

authorship of the complained of "Arnheiter Affair". Under these circumstances, we hold that Arnheiter qualifies under both the public official and public figure tests and that the book must be judged against the New York Times standard of actual malice.

When the constitutional privilege is established, the allegedly libeled person must come foward with "clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." Gertz v. Welch, 418 U.S. 323, 342, 94 S. Ct. 2997, 3008, 41 L.Ed2d 789(1974). This is for judicial determination. New York Times v. Sullivan supra. " Reckless disregard" has been held to mean "those false statements made with a high degree of awareness of their probable falsity." Garrison v. Louisiana supra. 379 U.S. at 74, 85 S. Ct. at 216. Sheehan did not

given to testimony of infidelity; and, second, she had not freely chosen to publicize the details of her married life. In contrast, Arnheiter's removal from command of a war vessel implicated critical issues of public concern, i.e. military decision-making in the conduct of war, and the selection of those entrusted with our national defense. Arnheiter did much more than seek reversal of his removal. He used every conceivable effort to gain public exposure and to make his case a "cause celebre". He successfully courted massive publicity and eventually pressured one congressman to hold a series of ad hoc hearings on the subject of his removal. These hearings inspired Sheehan to join many other journalists who took an unusual interest in the case, ultimately resulting in Sheehan to

proceed irresponsibly with his writing effort. He spent more than three years researching the data,reviewing sworn testimony taken at various hearings,and talking with individuals who both supported and criticized Arnheiter's conduct.Appellant's argument that Sheehan recklessly attributed insanity to him misstates the facts.

(2) Arnheiter's final argument is that he was not permitted sufficient discovery. This case was over 3 years old when the summary judgment motion was heard,and a review of the records shows that appellant deposed both appellees and demanded and received Sheehan's research materials.There was no abuse of discretion in not permitting additional discovery.

AFFIRMED.

1."More commonly,those classed as public figures have thrust themselves to the fore front of particular public controversies

in order to influence the resolution of the issues involved."
Gertz v. Welch, 418 U.S. 323,345,94 S. Ct. 2997,3009,41 L.Ed2d 789 (1974)

Rule 60. Relief from Judgment or Order

(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949.

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

§ 1651. Writs, 28 U.S.C.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

Supreme Court, U.S.
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In the Supreme Court

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OCTOBER TERM, 1979

No. 79-433

MARCUS A. ARNHEITER,
Petitioner,

vs.

RANDOM HOUSE, INC. and NEIL SHEEHAN,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-433

MARCUS A. ARNHEITER,
Petitioner,

vs.

RANDOM HOUSE, INC. and NEIL SHEEHAN,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Marcus Arnheiter (hereinafter "petitioner") seeks review in this Court of the denial of his motion to vacate a final judgment before that denial has been reviewed by the Court of Appeals. Petitioner, however, has failed to make any showing that this case is related to any case pending before this Court or that it is of such imperative public importance that the ordinary appellate processes should be circumvented. In any event, there is no merit to petitioner's claim of abuse of discretion.

QUESTIONS PRESENTED BY THE PETITION

The questions presented by the petition are:

(1) Is this case related to any case pending in this Court? and

(2) Is this case of such imperative public importance as to justify deviation from the normal appellate processes?

Both these questions must be answered in the negative, and the petition for certiorari therefore should be denied. The question which petitioner seeks to have reviewed, but which this Court need not consider, is whether the district court abused its discretion in declining to vacate a final judgment which was entered November 5, 1975, and affirmed by the United States Court of Appeals for the Ninth Circuit on July 17, 1978.

STATUTES AND RULES

Sections 1254(1) and 2101(c) and (e) of Title 28 of the United States Code (62 Stat. 928, 962; 63 Stat. 104), Rule 60(b) of the Federal Rules of Civil Procedure and Rule 20 of the Rules of the United States Supreme Court are reproduced in the Appendix to this Brief.

STATEMENT OF THE CASE

A. The facts of the Western Action.

In January 1972, Neil Sheehan authored and Random House published a book entitled *The Arnheiter Affair*. The book reported events about petitioner's command of a U.S. Navy warship on patrol off the coast of South Vietnam, petitioner's removal from command, and petitioner's extensive but unsuccessful efforts to prove that he had acted correctly and that the Navy wrongfully had relieved him of command.

In February 1972, petitioner filed in the Northern District of California an action alleging that he had been libeled by respondents Sheehan and Random House (the "Western Action"). During the next three and one-half years, petitioner conducted extensive discovery: Sheehan produced to petitioner his voluminous research materials; both Random House and Sheehan responded to lengthy interrogatories; and petitioner deposed both Sheehan and a representative of Random House. Respondents then moved for summary judgment on the ground that petitioner, who was a public official and a public figure, could not meet his constitutional burden of proving that the alleged defamations were made by respondents with "actual malice" (*New York Times Co.* v. *Sullivan* (1964) 376 U.S. 254). By order dated November 5, 1975, the district court found that plaintiff "ha[d] not met and could not, with further discovery, meet the burden placed upon him [under *New York Times Co.* v. *Sullivan*]," and it granted summary judgment for defendants.

On appeal, the judgment was affirmed (*Arnheiter* v. *Random House, Inc.* (9 Cir. 1978) 578 F.2d 804). The Ninth Circuit held that petitioner was both a public official and a public figure, that actual malice had not been shown, and that there had been no abuse of discretion in denying further discovery (578 F.2d 805-806). No petition for certiorari was filed from that judgment.

Almost one full year after the Ninth Circuit's affirmance, petitioner filed in the Northern District of California a motion purportedly under Rule 60(b) of the Federal Rules of Civil Procedure to vacate that court's prior judgment.

The sole ground urged in support of the motion was that certain appellate decisions,[1] totally unrelated to his litigation, warranted relief. On August 17, 1979, the district court denied petitioner's motion and, having found that the motion was frivolous, groundless and vexatious, imposed sanctions of $300 against petitioner and his counsel. Petitioner filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit on August 29, 1979, and the proceeding is now pending before that Court. Petitioner filed the instant petition for certiorari in September 1979, seeking review by this Court prior to a decision by the Court of Appeals.

B. The facts of the Eastern Actions.

In April 1972, Neil Sheehan was interviewed on a television talk show concerning his book. In June 1972, petitioner commenced an action in the Southern District of New York, alleging libel by reason of the broadcast. Subsequently, Dell Publishing Co. Inc. published a paperback edition of *The Arnheiter Affair*. In June 1973, petitioner commenced yet another libel action, again in the Southern District of New York, this time based on the paperback. Defendants' motions for summary judgment in those libel actions were granted, and judgments were entered in October 1978.

[1]Petitioner cited *Wolston* v. *The Reader's Digest Association, Inc.* (June 26, 1979) ... U.S. ..., 47 U.S.Law Week 4840, *Hutchinson* v. *Proxmire* (June 26, 1979) ... U.S. ..., 47 U.S.Law Week 4827, and *Herbert* v. *Lando* (April 18, 1979) ... U.S. ..., 47 U.S.Law Week 4401, decided by this Court, and the California Supreme Court's decision in *Good Government Group of Seal Beach, Inc.* v. *Superior Court* (1978) 22 Cal.3d 672, certiorari denied (May 21, 1979) ... U.S. ..., 47 U.S.Law Week 3761.

In June 1978, Donald G. Brownlow, the author of a manuscript on petitioner's exploits, commenced an antitrust action in the Southern District of New York, alleging that a conspiracy in restraint of trade had blocked the publication of his manuscript. The district court dismissed that action in November 1978.

In May 1979, the United States Court of Appeals for the Second Circuit heard appeals from the two libel actions and the antitrust action filed in the Southern District of New York (hereinafter collectively referred to as the "Eastern Actions"), and it affirmed all three judgments on May 18, 1979. On August 17, 1979, a petition for certiorari seeking review of these three actions was filed and docketed as case No. 79-281.

ARGUMENT

I. THE ONLY ISSUE RAISED BY THE PETITION IS DISTINCT FROM THAT IN THE EASTERN ACTIONS AND IS WITHOUT IMPERATIVE PUBLIC IMPORTANCE JUSTIFYING DEVIATION FROM NORMAL APPELLATE PROCESSES.

The issue presented in the proceedings pending before the Court of Appeal is a simple one: whether the district court abused its discretion when it denied a motion under Federal Rule of Civil Procedure 60(b). The issues in the Eastern Actions relate to the propriety of three different judgments of dismissal, and they are wholly separate.[2]

[2]One argument against granting the petition in the Eastern Actions is relevant here. The petition in No. 79-281 was filed more than 90 days after entry of judgment by the Court of Appeals, without an extension having been granted. The petition in No. 79-281 should therefore be denied as untimely (28 U.S.C. § 2101(c) and Rules 13 and 22 of this Court; see generally Br. of Resps. in Opposition, No. 79-281, pp. 19-20). Inasmuch as petitioner bases the petition in No. 79-433 on the pendency of the petition in the Eastern Actions, this petition should also be denied.

In any event, exercise of the Court's certiorari jurisdiction before judgment by the Court of Appeals is properly reserved "for extremely important cases, in which the public interest require[s] an immediate authoritative decision" (R. Stern and E. Gressman, Supreme Court Practice (5th Ed. 1978) p. 55). The Western Action may well be of personal interest to petitioner. But, unlike cases in which the Court has exercised certiorari jurisdiction before judgment by the Court of Appeals (e.g., *United States* v. *Nixon* (1974) 418 U.S. 683 (Watergate tapes case[3]); *Youngstown Co.* v. *Sawyer* (1952) 343 U.S. 579 (steel mills seizure case); *United States* v. *Mine Workers* (1947) 330 U.S. 258 (John L. Lewis contempt case); *Ex parte Quirin* (1942) 317 U.S. 1 (wartime saboteur case)), this case lacks any paramount public interest to "justify the deviation from normal appellate processes" (Rule 20 of this Court).

II. IN ANY EVENT, THE DISTRICT COURT PROPERLY DENIED PETITIONER'S RULE 60(b) MOTION.

A. Rule 60(b) does not contemplate relief from judgment on the basis of new legal decisions.

Petitioner argues that he was entitled to have the judgment against him vacated because of certain appellate decisions in cases totally unrelated to his litigation. Without citing a single supportive authority, petitioner predicated the motion on Rule 60(b) of the Federal Rules of Civil Procedure which, in pertinent part, provides:

[3]In the Watergate case, the Court dismissed as improvidently granted the President's cross-petition, which raised the issue whether the grand jury had acted within its authority in naming the President an unindicted coconspirator (418 U.S. 687, n. 2). While of obvious importance to the President, the issue was not of paramount public importance.

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * * (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

Rule 60(b) seeks to buttress the finality of judgments while providing some relief from unjust judgments (7 Moore, Federal Practice (2d Ed. 1979) (hereinafter "Moore") ¶ 60.27[1], p. 340). The rule, however, is not a substitute for appeal (*Eutectic Corp.* v. *Metco, Inc.* (2 Cir. 1979) 597 F.2d 32, 34; *Martella* v. *Marine Cooks & Stewards U., Seafarers Int. U.* (9 Cir. 1971) 448 F.2d 729, 730, certiorari denied (1972) 405 U.S. 974; Moore, ¶ 60.18[8], p. 217, and ¶ 60.27[1], p. 348), and it is reserved for extraordinary circumstances (*Klapprott* v. *United States* (1949) 335 U.S. 601; see also *Ackermann* v. *United States* (1950) 340 U.S. 193, 199; *Martella* v. *Marine Cooks*, supra, 448 F.2d 730). No extraordinary circumstances attended petitioner's motion.

Moreover, it is settled that Rule 60(b) does not authorize relief simply because the law applied initially has been overruled or declared erroneous in another, unrelated proceeding (*Title* v. *United States* (9 Cir. 1959) 263 F.2d 28, 31, certiorari denied (1959) 359 U.S. 989; also see *Lubben* v. *Selective Service System Local Bd. No. 27* (1 Cir. 1972) 453 F.2d 645, 650; *Berryhill* v. *United States*

(6 Cir. 1952) 199 F.2d 217, 219; *Schmidt* v. *Schubert* (E.D. Wis. 1978) 79 F.R.D. 128, 129; *Loucke* v. *United States* (S.D.N.Y. 1957) 21 F.R.D. 305, 308). As the court stated in *Collins* v. *City of Wichita, Kansas* (10 Cir. 1958) 254 F.2d 837, 839:

> "Litigation must end some time, and the fact that a court may have made a mistake in the law when entering judgment, or that there may have been a judicial change in the court's view of the law after its entry, does not justify setting it aside."

In this case, as in *Collins,* petitioner appealed and lost; his appellate remedies were exhausted, and the litigation concluded.

B. Moreover, the recent decisions of this Court cited by petitioner would effect no change in the result of the underlying litigation.

There is no basis for petitioner's contention that his status as a public official and a public figure is affected by this Court's recent decisions. In both *Wolston* v. *Reader's Digest Association, Inc.* (June 26, 1979) ..... U.S. ....., 47 U.S. Law Week 4840, and *Hutchinson* v. *Proxmire* (June 26, 1979) ..... U.S. ....., 47 U.S.Law Week 4827, the Court reversed findings of "public figure" status because, in each case, the plaintiff had not thrust himself or his views into public controversy (*Wolston,* supra, 47 U.S.Law Week 4842; *Hutchinson,* supra, 47 U.S.Law Week 4834). In this case, however, petitioner "courted massive publicity" and even instigated a congressional inquiry into his removal *before* publication of the allegedly libelous book (578 F.2d 805).

Nor is there any basis for petitioner's claim that this Court's decision in *Herbert* v. *Lando* (April 18, 1979) ..... U.S. ....., 47 U.S.Law Week 4401, entitles him to reopen a final judgment and undertake further discovery. In the *Herbert* case, this Court rejected a television producer's bid to establish a constitutional privilege foreclosing direct inquiry into the editorial process. In doing so, however, the Court cautioned: "[T]he discovery provisions, like all of the Federal Rules of Civil Procedure, are subject to the injunction of Rule 1 that they 'be construed to secure the just, *speedy,* and *inexpensive* determination of every action'" (47 U.S.Law Week 4407) (emphasis of Court). The Court specifically left open the nonconstitutional question whether the trial court had properly applied the rules of discovery (id.). In the instant case, petitioner conducted extensive discovery over a period of more than three and one-half years, and, in 1975, the district court held that "plaintiff ha[d] not met and could not, with further discovery, meet the burden placed upon him" (Order, dated November 5, 1975). The Ninth Circuit affirmed that discovery ruling (578 F.2d 805).[4] Thus, far from advancing petitioner's cause, the *Herbert* case defeats it.

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[4]This Court has never held that summary judgment is prohibited in constitutional libel cases. Nor, contrary to petitioner's suggestion (Pet. in No. 79-433, p. 14), did the trial court in the Western Action grant summary judgment on the basis of some "rule of thumb." The district court simply held that petitioner had not met and could not meet his constitutional burden. After affirmance by the Ninth Circuit, that decision became final.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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APPENDIX A

APPENDIX

Statutes

28 U.S.C. § 1254: "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree" (62 Stat. 928, 962).

28 U.S.C. § 2101(c): "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days" (63 Stat. 104).

28 U.S.C. § 2101(e): "An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment" (63 Stat. 104).

Rules

Federal Rules of Civil Procedure, Rule 60(b): "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated

intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action."

Rules of the Supreme Court of the United States, Rule 20: "A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court. See *United States* v. *Bankers Trust Co.*, 294 U. S. 240; *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330; *Rickert Rice Mills* v.

Fontenot, 297 U. S. 110; *Carter* v. *Carter Coal Co.*, 298 U. S. 238; *Ex parte Quirin*, 317 U. S. 1; *United States* v. *United Mine Workers*, 330 U. S. 258; *Youngstown Co.* v. *Sawyer*, 343 U. S. 579."